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# Real Estate Transactions Cases and Materials (5th ed.)

VOLUME III

1977-78

Professors B.J. Reiter  
and  
R.C.B. Risk  
of the  
Faculty of Law  
University of Toronto

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Table of Contents

CHAPTER XI	LAND TITLES	712
(a)	Introduction	712
	Smith, Registration of Titles in Ontario and the Prairie Provinces	712
(b)	The Land Titles Act	716
	The Land Titles Act	716
(c)	Priorities	782
	Note	782
	The Land Titles Act	782
	Hackworth v. Baker	783
	Note	794
	The Land Titles Act	794
	Re Jung and Montgomery	795
	Note	798
	Re Dominion Stores Ltd. and United Trust Co. et al.	799
	Note	818
	Questions	818
	Russo et al. v. Field et al.	818
	Note	821
	Question	821
	Note	821
	The Land Titles Act	822
	Gibbs v. Messer	822
	Questions	827
	Raney, Priority Under the Land Titles Act	827
	The Land Titles Act	827
	Credit Foncier Franco-Canadien v. Bennett	829
	Questions	834
	Note	835
	The Land Titles Act	835
	Gatz v. Kiziw	836
	Question	839
(d)	The Assurance Fund	840
	The Land Titles Act	840
	Note	840
	Fawkes v. The Attorney-General for Ontario	840

Questions	844
Fiflis, English Registered Conveyancing: A Study in Effective Land Transfer	845
Note	852
 CHAPTER XII OFF THE RECORD CLAIMS	 854
(i) Adverse Possession	854
The Land Titles Act	854
(ii) Financial Claims	855
The Executions Act	855
The Land Titles Act	855
The Municipal Act	855
The Corporations Tax Act	856
The Income Tax Act	856
(iii) Public Regulation	857
 CHAPTER XIII BOUNDARIES AND DESCRIPTIONS	 858
Lines on the Land	858
The Township Lot Framework of Ontario	867
Comparison of a Sketch with Description	868
Plan of Subdivision on a Township Lot	869
The Surveys Act	870
Kristiansen v. Silverson	871
Diehl v. Zanger	876
McFatridge v. Griffin	878
Note	885
 CHAPTER XIV TECHNOLOGY AND RECORDING TITLE TO LAND	 886
(a) The Horizontal Control System	886
A Brief Recommending Changes in the Administration of Land Surveying in Ontario	886
The Surveys Act	887
(b) The Computer and Recording Title to Land	888
Whalen, Electronic Computer Technology and the Torrens System	889

(c) A Comprehensive and Unified Land Information System	893
Cook, A Modern System of Public Land Records	893
Note	895
Report on Land Registration	895
Note	913
SECTION III Remedies of Vendors and Purchasers	
CHAPTER XV TIME PROVISIONS	915
(a) Introduction	915
(b) Interpretation: Generally	915
Stickney v. Keeble	915
Smith v. Hamilton	921
Note	921
(c) Hardship Cases	921
Note	921
Note	922
Steedman v. Drinkle	922
(d) Ensuring Fair Conduct	925
Whittall v. Kour	925
Note	930
Porter v. Harrington	930
Dobbin v. Niebergall	932
King v. Urban & Country Transport Ltd.	935
Iwanczuk v. Centre Square Developments Ltd.	937
Question	940
CHAPTER XVI TENDER	941
Note	941
Genern Investments Ltd. v. Back	942
Note	944
Beckett v. Karklins et al.	944
Questions	946
Note	947
CHAPTER XVII DAMAGES	948
Note	948
(a) The Purchaser Suing	949
Bain v. Fothergill	949
Note	953
Question	954

Note	955
Law Reform Commission of British Columbia, Report on the Rule in Bain v. Fothergill	956
Questions	959
Note	959
Wroth v. Tyler	960
Souster v. Epsom Plumbing Contractors Ltd.	968
Horsler v. Zorro	969
Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services Ltd. et. al.	970
Note	971
Questions	972
Note	973
Question	974
Note	974
Stephens v. Gulf Oil Canada Ltd.	975
Sidan Investments Ltd. v. W.B. Sullivan Con- struction Ltd.	976
(b) The Vendor Suing	977
Dobson v. Winton & Robbins Ltd.	977
Questions	981
CHAPTER XVIII LIENS	982
Note	982
(a) Purchasers' Liens	982
Whitbread & Co. v. Watt	983
Whitehead v. Trustee, Lach Gen. Contractors Ltd.	985
Questions	987
J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye	988
Question	990
(b) Vendors' Liens	990
Note	990
Lang and Lang v. MacMillan et al.	991
Questions	993
Note	993
Freeborn v. Goodman	993
Note	996
Questions	996

CHAPTER XIX	RESCISSION	998
Note		998
Question		999
Horsler v. Zorro		999
Bines v. Sankey		1000
Vance v. Baldwin		1001
McKinley, Vendor-Purchaser Law		1001
J. Weir, Remedies with Respect to Contracts of Purchase and Sale		1001
Uniform Land Transactions Act		1002
Note		1003
Question		1003
Note		1003

CHAPTER XILAND TITLESa) Introduction

The essential idea of Land Titles has already been indicated: the state assumes the responsibility of providing a simple, brief statement of the ownership of land; each separately owned parcel of land is allotted a page or pages in a Register on which the name of the owner is stated and the various transactions are recorded. As claims and interests are transferred or extinguished, the prior entries are crossed out and new ones made. Purchasers may rely on the face of the Register; an examination of the successive dealings with property is largely unnecessary. Transactions are closely supervised, and their forms are restricted to narrow limits. One of the major problems for a Land Titles system is the extent to which these consequences can be avoided, and, to the extent that they could be avoided whether they are worthy sacrifices for the advantages of Land Titles. These are factors to be considered in comparing Land Titles to the Registry system.

Land Titles was introduced in England in 1862, but used very little until fairly recently. It gained a small foothold in the United States during the first three or four decades of this century, but continuous opposition, primarily from the Title Insurance and Abstract companies, has been so effective that it is almost buried.

SMITH, REGISTRATION OF TITLES IN ONTARIO AND THE PRAIRIE PROVINCES  
(1965), 30 Sask. B. Rev. 275

Of the three known methods of recording the rights to and over land the system of registration of title has, after years of successful operation in an ever-increasing number of countries in the world, emerged as the most superior. This superiority is immediately understandable when one pauses to reflect on the deficiencies and weaknesses of the two other existing systems of private conveyancing and registration of deeds which have been revealed time and time again in many writings. However, it was fortuitous that these shortcomings were repugnant enough to stimulate the need for reform since reform led ultimately to the creation of the system of registration of title which is today being so successfully regulated by the provisions and operations of a variety of statutes in many parts of the world.

In Canada, when the need for land registration reform was felt and the merits of a system of registration of title (hereinafter, when convenient, referred to as "the system") were being propagated, there were several legislative precedents within the British Commonwealth of Nations

available to Canadian jurisdictions. The foremost of these was the South Australian Act of 1857, whose successful introduction of the system in Australia paved the way for the passing of similar statutes in Queensland in 1861; in Victoria, New South Wales and Tasmania in 1862 and in New Zealand and West Australia in 1874. The creator of the system in Australia was Richard Robert Torrens who, by this distinguished achievement, earned for himself a knighthood and lasting fame through the system's perpetuation of his name in many lands. There were two precedents in England, the pioneer Land Registry Act of 1862, and its successor, the English Land Transfer Act of 1875, both of which failed in initiating a system of registered titles -- an English system which was created independently of but almost simultaneously with the Torrens system. Necessity had demanded that these two statutes should be drafted along highly technical lines, for each was intended to be the machinery capable of introducing and operating effectively a new system of conveyancing within a framework of substantive land law that was cumbrous, archaic and intricate, "in a country where custom and precedent exercised a dominating influence and where titles to land reflected their ancient origin." The circumstances prevailing in Australia, on the other hand, allowed the Torrens statutes to be drafted along much simpler lines, for Australia was a new colony "where a large part of its territory had not passed from the Crown and where none of the titles to land had a history comparable to that of any parcel of land in England."

The creators of the first Ontario Land Titles Act appear to have been completely uninfluenced either by the remarkable failure of the English Land Transfer Act of 1875 or by its technical aspect as a legislative precedent, for the former Act, when passed in 1885, was almost a transcript of the latter. The Rules were also taken largely from the Rules made under the English Act, and along with the Forms were made Schedules to the Act and were printed with it.

The circumstances existing in Manitoba and the Northwest Territories in 1885 and of the new provinces of Alberta and Saskatchewan in 1905 corresponded much more closely with the state of affairs in Australia than those in England and indeed in Ontario, and therefore it is not surprising to find differences between the Acts of the western jurisdictions and that of Ontario comparable to that which existed between the Australian Acts and the English Acts of 1875 and 1897. The Torrens system of registration of title reached the territories now known as Alberta and Saskatchewan, while they were still part of the Northwest Territories, in the form of the Territories Real Property Act of 1886, which was replaced in 1894 by the Land Titles Act of 1894, an Act based on the New South Wales Torrens statute. The land titles legislation introduced in Manitoba in 1885 had as its basis the Victoria Torrens statute.

Thus, with the Ontario statute having for its foundation an English model and the Acts of the Prairie Provinces following the Australian prototypes, a diversity of arrangement and language characterized the basic land titles legislation in these provinces, a diversity which persists to the present day. However, although the Acts exhibit such dissimilarities they, nevertheless, all have the same purpose in view.

The accepted aim of legislatures in the field of land titles legislation is to offer to the public a method of conveyancing which combines more or less the features of security, simplicity, accuracy, cheapness, expedition and suitability to its circumstances. Put into more explicit language the features of the system, in theory, are:

- (1) It is a system of state registration of title to land; the state, within certain limitations, guarantees the title and operates the system's machinery.
- (2) Transactions must all be registered against the title in the state-operated land titles office, and they are not valid in the form of mere instruments executed by the parties as against other competing registered interests.
- (3) The certificate of title is intended to be a complete and accurate reflection of the result of all preceding transactions affecting the property. Persons dealing with a registered proprietor do not, therefore, have to look elsewhere than the certificate, except to search a few statutory exceptions to indefeasibility.
- (4) An assurance fund is usually provided, which, according to the original theory of Torrens, was intended to provide compensation to those persons who suffer loss by reason of errors or omissions of the registrar or misfeasance in the operation of the system.
- (5) Each parcel of land is recorded in the register at the land titles office as a unit of property. The land is surveyed and accurate boundary and parcel descriptions are available that facilitate the recording of land dispositions.

In Alberta and Saskatchewan the Land titles system administered under the respective Land Titles Act is the only system of recording rights to real property. In these jurisdictions the initial registration of land under the system is restricted to lands patented before January 1, 1887, which was the operative date of The Territories Real Property Act, R.S.C., 1886, ch. 51, and accordingly, applications for first registration under the system are few. In Manitoba the "old system" of registration of deeds under the Registry Act exists side by side with the "new system" of registration of title under the Real Property Act. Like Manitoba, Ontario has alternative systems of land registration, registration of deeds under the Registry Act and registration of title under the Land Titles Act. Consequently, the creators of the land titles legislation in these two latter provinces had to face the problem of deciding whether the introduction of the system should be compulsory or voluntary. This same problem had been faced in England and Australia where, of course, the establishment or registration of title required a deliberate and comprehensive constructive effort, and the chief argument against compulsion had been the arbitrary interference with a landowner's right to deal with his own property which would result. It had also been urged that if the system was a good one it could rely upon its own merits to promote it.

The creators of the Manitoba and Ontario Acts, no doubt benefitting from the debates which had ensued in the British House of Commons and the experience gained from the policies consequentially adopted in England and Australia, decided, like most territories in the British Commonwealth, to enact measures designed to get land gradually on the Register by a combination of limited compulsion and option. Thus, in Manitoba a patent or grant of land from the Crown issuing after February 20th, 1914, becomes at once subject to the operation of the "new system", also, where land is under the "old system" the owner of an estate or interest in land thereunder may apply for the registration of his estate or interest or the whole title. Apart from these provisions, the Manitoba Real Property Act provides that the Lieutenant-Governor in Council may, by proclamation, appoint a day on which all land, other than Crown land, not registered under or subject to the Act, shall become subject to the Act, and, on and after that day, no registration affecting the land may be effected under the old system in any Land Titles office.

In Ontario a tentative approach was made in the introduction of the system since the first Act was made applicable only to the County of York, including the City of Toronto. Soon after, in 1887, it was extended to include the outlying northern districts of Algoma, Thunder Bay, Muskoka, Parry Sound and Nipissing; optionally as far as land already patented was concerned but compulsorily with respect to all lands alienated by the Crown after the Act came into force. Thus, the pattern was set for the progressive operation of the system in the Province, with provisions for the employment of a mixture of limited compulsion and option in Northern Ontario and the exercise of option in Southern Ontario.

In each jurisdiction general control over all land titles offices is exercised by the Department of the Attorney General. The title of the official charged with the administration of the system varies in each Province; in Alberta he is the Inspector of Land Titles Offices; in Manitoba he is the Registrar-General; in Saskatchewan he is the Master of Titles; and, in Ontario, he is the Director of Titles. However, though the titles vary, the professional qualifications called for in each province is standard in that the person must be a lawyer of prescribed years' standing. In general, in each jurisdiction this officer exercises supervision over all land titles offices, is responsible for regulating the practice of these offices, and rules on any point of law or practice referred to him by a "district registrar". In addition, to his own powers and duties under the respective Acts or any others, he has all the powers of a "district registrar".

The principal registering authority having charge of the land titles office in a district (above referred to as "district registrar") is called the Registrar in the Prairie jurisdictions or Master of Titles in Ontario. It has been said that those in charge of land titles offices should not only be sound lawyers but also competent administrators equipped with business acumen, constantly alive to the needs of the community they serve and willing at all times to bend their practices to fit new situations. The importance of this officer to the system is unquestionable,

since, by reason of his direct responsibility to the Department of the Attorney General and the public, it is with him that most recommendations for the improvement of the system originate. The duties required of him in each jurisdiction are both quasi-judicial and administrative and involve the exercise of discretionary powers. Though, in general, in each jurisdiction he is vested with the same wide powers, the power of the Registrar in Alberta is restricted since he must refer any application for initial registration to a Judge in any case in which he has received notice of any interest in the land other than that of the applicant and the owner of such interest refuses to consent to the registration of the land.

b) The Land Titles Act, R.S.O. 1970, C. 234, as amended to 1973, C.39.

## PART I

### PRELIMINARY

#### 1. In this Act,

- (a) "court" means the Supreme Court;
- (b) "duplicate plan" means a true copy of a plan that is prepared in accordance with the regulations;
- (c) "lot" includes a block, reserve and any other delineation of land on a plan;
- (ca) "master of titles" means a land registrar appointed under section 6 for a locality in which this Act is in force;
- (cb) "Minister" means the Minister of Consumer and Commercial Relations;
- (d) "mounted duplicate plan" means a true copy of a plan that is prepared and mounted in accordance with the regulations;
- (e) "owner" means an owner in fee simple;
- (f) "plan" means a plan that is drawn in accordance with the regulations;
- (g) "prescribed" means prescribed by this Act or by the regulations;
- (h) "proper master of titles" means the master of titles in whose office the land affected or intended to be affected by any proceeding, instrument or document is or may be registered;
- (i) "registered" means registered under this Act;
- (j) "regulations" means the regulations made under this Act. R.S.O. 1970, c. 234, s. 1; 1972, c. 1, s. 43 (1); 1972, c. 132, s. 1.



## CHAPTER XII

OFF THE RECORD CLAIMS

The title "Off the Record Claims" is taken from literature from the United States, and is not a familiar phrase in Ontario. It is not a term of art, but it is a convenient and expressive way of labelling the problem that is the subject of this short Chapter. The searches made in the Registry and Land Titles systems are necessary, but are not enough; a frightening array of adverse claims is effective even though not registered under the Registry and Land Titles systems, and even against a good faith purchaser. A catalogue of these claims is difficult to make, for the drawing of a comprehensive list is a formidable undertaking, albeit a finite one, and organizing the claims into comprehensible and useful groups is even more formidable. The literature and conveyancing practice suggest three groups - adverse possession, financial claims (government and private), and public regulation. These groups do not include some claims that are effective even though not registered - claims that are effective unless extinguished with respect to a later registered claim acquired for value and without actual notice of fraud, claims against land governed by the Registry system that are effective because of the invalidity of a document, and claims about boundaries. These exceptions are a consequence of the difficulty of dividing these materials among chapters and demonstrate that the title of this Chapter, again, is not a term of art.

Many of these matters have been canvassed generally earlier in the materials; they are reproduced together here to illustrate the breadth of coverage required of a lawyer even in the most simple transactions.

(i) Adverse Possession

Adverse possession and prescription are effective - that is, they can eventually bar remedies for claims and interests - against land governed by the Registry system, but not by the Land Titles system.

THE LAND TITLES ACT, R.S.O. 1970, c. 234

58.(1) Notwithstanding any provision of this Act, the Limitations Act or any other Act, no title to and no right or interest in land registered under this Act is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription. ...

(ii) Financial Claims

If a judgment has been given for a sum of money, the plaintiff (the judgment creditor) can obtain a writ of execution from the Court that gave the judgment.

This writ ("writ of fi fa", or "execution") can be filed with the sheriff of any county, and when filed, is a claim against any interest of the judgment debtor in land in the county governed by the Registry system. The judgment creditor can order the sheriff to send a copy to the Land Titles office for the county. If this is done, the claim affects any interest in land governed by the Land Titles system (see p. 429 above.)

THE EXECUTIONS ACT, R.S.O. 1970, c. 152.

10.(1) Subject to the Land Titles Act and Section 11 a writ of execution binds the goods and lands against which it is issued from the time of the delivery thereof to the sheriff for execution, ...

THE LAND TITLES ACT, R.S.O. 1970, c. 234

153.(1) The sheriff or other officer to whom an execution or other writ, or renewal thereof, affecting registered land is directed, forthwith after its delivery to him, upon written request of the party by whom it was sued out or renewed, or of his solicitor, but not otherwise, shall deliver or transmit by registered mail to the proper master of titles a copy of the writ or renewal certified under his hand, and no registered land is bound by any such writ until such copy has been received by the proper master of titles and, after the receipt by him of the copy, no transfer or charge by the execution debtor is effectual, except subject to the rights of the execution creditor under the writ.

THE MUNICIPAL ACT, R.S.O. 1970, c. 284

511. The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving his recourse against any other person, and are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent or officer, or by want of registration.

THE CORPORATIONS TAX ACT, R.S.O. 1970, c. 91.

94.(1) All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and ... are a first lien and charge upon the property in Ontario of the corporation liable to pay such taxes, interest, penalties, costs and other amounts. ...

INCOME TAX ACT, S.C. 1970-71-72, C. 63, as amended

116. **(5) Liability of purchaser in certain cases.** Where in a taxation year a purchaser has acquired from a non-resident person any of that non-resident person's taxable Canadian property other than excluded property,

- (a) the purchaser, unless after reasonable inquiry he had no reason to believe that the non-resident person was not resident in Canada, is liable to pay, as tax under this Part for the year on behalf of the non-resident person,
  - (i) 15% of the cost to the purchaser of the property so acquired, if no certificate has been issued under subsection (2) in respect of the disposition of the property by the non-resident person to the purchaser, or
  - (ii) in any other case, the lesser of
    - (A) 15% of the cost to the purchaser of the property so acquired, and
    - (B) 25% of the amount, if any, by which the cost to the purchaser of the property so acquired exceeds the certificate limit fixed by the certificate issued under subsection (2) in respect of the disposition of the property by the non-resident person to the purchaser,
 and is entitled to deduct or withhold from any amount paid or credited by him to the non-resident person or otherwise recover from the non-resident person any amount paid by him as such tax;
- (b) at such time, if any, as any certificate under subsection (4) is issued to him by the Minister in respect of the property, the purchaser ceases to be liable under this subsection to pay any amount as tax under this Part for the year on behalf of the non-resident person; and
- (c) the purchaser shall, within 30 days after the end of the month in which he acquired the property, remit to the Receiver General of Canada the tax for which he is liable under paragraph (a).

NOTE:

See also pages 431 to 435 above.

(iii) Public Regulation

Almost all of the regulations described in Chapter 8 are effective even though not registered.

Searches are generally made for some of these regulations; others are ignored, either because of ignorance of their potential existence or because a calculated risk is taken. (Recall Kolan v. Solicitor, p. 439 above; and Hauck v. Dixon, p. 153, above.)

These regulations present difficult and important problems: Should requirements be imposed that some, or all, be registered to be effective? What can and should a careful purchaser do? What is the duty of a lawyer acting for a purchaser? What improvements are feasible (apart from a requirement of registration, if this is an improvement)?

## CHAPTER XIII      BOUNDARIES AND DESCRIPTIONS

The organization of these materials has assumed a distinction between boundaries and title. This distinction is one between two elements of a single concept - an interest in land - and each alone can be meaningless, but the distinction can be made, and legal and technological differences make it useful. The topics in this Chapter are the framework for designating boundaries and making descriptions, techniques for making descriptions controls over descriptions, problems in determining the location of boundaries, the interpretation of ambiguous descriptions, and assurances made by the state about the location of boundaries. Some of the possibilities for improvement are postponed to the next Chapter.

### **LINES ON THE LAND**

Crown Surveys and Settlement in Upper Canada

by R. Louis Gentilcore , *Ontario History*, Vol. LXI,  
1969, . 57

Many of the major elements in the landscape of Ontario stem from conditions produced by the original surveys of land. The pattern born of the survey includes single rows of farmsteads along front concession lines, the alignment of single farmsteads at regular intervals along concession roads, the presence of belts of farm woodlots along the back concessions, and the rectangular shape of fields and properties.<sup>1</sup> The road system was fundamentally affected. Road allowances at regular intervals were an essential part of the survey blocks. With few exceptions, surveys preceded occupancy; their effect was bound to be widespread and persistent.

This paper deals with the introduction of the crown surveys in Upper Canada. The various types of surveys are indicated and mapped; the influences of topography are considered and relationships between the survey and the granting of land suggested. The division of the province into counties and the government's grand design for settlement are seen as part of the surveys. Finally, the survey field notes are cited as valuable sources of information.

### **A Brief History**

Crown surveys laid the foundation for the organization and occupancy of Upper Canada. In the situation created by the separation of the American colonies from Great Britain, suitable lands had to be made available for settlement as quickly as possible.<sup>2</sup> As a result, the surveys were given top priority. To the government of the day all else was secondary, including the devising of satisfactory systems of land titles and land ownership.<sup>3</sup> The first township in what is now southern Ontario was laid out in 1783. Since then, approximately 600 townships have been established in a land area of 49,000 square miles. In their layout, many factors, physical and cultural, have exercised an influence - landforms, rivers and swamps, shorelines of lakes, limits of Indian purchases and military and colonization roads.

The system of laying out land in townships was introduced to Canada by the British, after the defeat of the French in 1763. Survey parties were sent to inves-

the grant were surveyed in 1792 (Fig's. 1,5), non-Indian settlement had begun to take place. The detachment of various "leases" was soon followed by the purchase of whole townships, some of which were surveyed in distinctive ways. One of the most unusual was the survey of Canboro township. The land was purchased in 1810 by a speculator, Benjamin Canby, who laid out a village (named after himself) and then divided the rest of the tract into blocks of unequal sizes and irregular shapes, served by a system of roads that centred on the village.

Before 1798, the upper portions of the Grand River tract were set aside for sale and divided into four blocks, each of which became a township associated with settlements by an ethnic group. For example, one of the blocks (later Waterloo township) became the German Company tract, the property of a group of Germans from Pennsylvania whose settlement in the area from 1799 to 1810 provides an early instance of the penetration of the Ontario interior. Previous to its sale, the lower part of the township had been divided by its owner-speculator on the "single front" system, with lots 200 acres in size and with provision for concession roads and side roads. The German Company used its own system and divided the rest of the township into lots most of which were 448 acres in size. The road allowance was neglected. Inevitably, an irregular road network developed and numerous disputes had to be settled before public roads could be built. In addition the lot size proved too unwieldy (the large area was designed to take care of family expansion) and sub-division soon followed.

**NOTE** This framework of concessions and lots still exists, and is the original and comprehensive framework for boundaries and descriptions in Ontario. One important element, which is (understandably) not described and discussed by Gentilcore is monumentation. The work of the surveyors included planting monuments - wooden or iron bars - at the corners of the concessions and lots. These monuments were not planted at all the corners of all the lots; if planted they might have been - and often were - not planted at the location that was intended and specified; and if planted at the location intended and specified, they might have - and often have - deteriorated, or been buried or moved.

As population grew the land in the heavily settled areas was divided and subdivided with increasing frequency. Descriptions based on the concession lots, or even on the original town lots, became cumbersome and complex. Plans of subdivision were introduced. An owner of land, who wished to divide it, and sell a number of smaller parcels to different purchasers, might, for the sake of convenience, have these lots surveyed, drawn on a plan and numbered, and register the plan. The work of surveying would include, again, planting monuments at corners of the lots.

In 1868 this procedure became compulsory where a description of the subdivided property based on the original survey would be so intricate that the land could not be "easily and plainly ... identified" [31 Vict. c. 20, s. 75]. Subsequent legislation broadened and clarified these provisions. In the early twentieth century, control over plans of subdivision became an aspect of public planning and supervision of land developments. Both The Registry Act and The Land Titles Act

prohibit registration of a plan of subdivision that has not been approved under the Planning Act. In 1958, strict survey standards and supervision were imposed on plans.

NOTE A concession lot can be described by specifying its number, the concession and the Township. For example:

All and singular that certain parcel or tract of land and premises situate lying and being in the Township of Mono, in the County of Dufferin, and being composed of lot number 32 in the third concession.

A lot on a plan of subdivision can be described by specifying its number and the plan. For example:

... being the whole of lot 47 according to a Plan registered in the Registry Office for the registry division of Toronto as number 2167.

Part of lots can be described by two techniques. The first is the specification of fractional parts. For example:

... being composed of the South half of the East half of lot number 32 in the third concession.

The second technique is a description by metes and bounds, that is, a tracing of the perimeter. This technique usually includes monumentation of the corners. For example:

... being composed of part of the South half of lot number 32 in the third concession and more particularly described as follows: Commencing at an iron bar planted at the South-East corner of the said lot 32; thence Northerly along the East limit of the said lot 32, 300 feet more or less to an iron bar planted, thence Westerly, and parallel to the South limit of the said lot 32, 200 feet more or less to an iron bar planted; thence Southerly and parallel to the East limit of the said lot 32, 300 feet more or less to an iron bar planted in the South limit of the said lot 32; thence Easterly along the South limit of the said lot 32, 200 feet more or less to the point of commencement.

The monuments might be natural monuments, such as fences or old cherry trees, but little imagination is needed to realize the difficulties presented by these picturesque possibilities. Parts of lots can also be described simply by reference to a specific survey (a graphic presentation of monuments planted at the corners).

Both The Registry and Land Titles Acts impose controls on the kinds of descriptions that may be used in registered documents. The Land Titles Act requires the registration of a plan of a survey for any subdivision of land governed by the system; The Registry Act is not as strict, and permits metes and bounds descriptions, although subject to limitations. Both Acts require descriptions in instruments to conform to registered plans.

## NOTE:

This Chapter would not be complete without mention of assurances by the state about the location of boundaries. The term "assurance" is not a term of art; it is used to denote authoritative and reliable statements about the location of boundaries made by the state. The very nature of the Registry system denies any assurance. The Land Titles Act, Section 159(2), provides that "the description of registered land is not conclusive as to the boundaries or extent of the land". This provision reflects the English "general boundaries" rule; this rule had been devised shortly before the introduction of the original Ontario Act, which was derived from the current English Act. The interpretation of section 159(2) can be debated, although in the administration of the Act, it is considered to be an assurance about the "existence" of a parcel and not its precise location and extent.

Frequently, when property is brought under the Land Titles system, the application for first registration under The Land Titles Act is combined with an application to confirm the property boundaries, under The Boundaries Act, R.S.O. 1970, c.48. The Boundaries Act procedure conclusively confirms the bounds of the parcel in question and once the property is covered by The Land Titles Act, future adverse possession is impossible. (Recall Gatz v. Kiziw, p.836 above.)

CHAPTER XIVTECHNOLOGY AND RECORDING TITLE TO LAND

The most dramatic and, arguably, the most important possibilities for improvement of the arrangements described in the past four Chapters are technological. This Chapter is composed of materials about three of the possibilities: (i) the horizontal control system (ii) the computer and recording title; and (iii) the vision of a comprehensive and unified land information system.

(A) The Horizontal Control System

The existing framework and techniques for designating boundaries and making descriptions has already been described. The Horizontal Control System is a major alternative. The concept of this system is simple and is not a product of electronic technology, but the technical aspects are immensely complicated - at least, to a layman - and the electronic technology makes the system feasible and useful. The system is based on a network of monuments, among which the distances and angles are measured to high degrees of accuracy. The location of any point in or near the network can be specified in co-ordinates derived from a co-ordinate axis and distances from the monuments. The network has been established in parts of Ontario, particularly around Toronto and the Niagara area, primarily because of the utility for the construction and maintenance of utilities and highways.

This system can be used to specify boundaries and make descriptions, and to index parcels. The indexing function needs some elaboration: The existing index of parcels is simply a series of arbitrary numbers that have no predictable relation to each other or to the location of the parcels. In the Registry system, the indices are numbers of lots, concessions and plans and in the Land Titles system, numbers of parcels. The horizontal control system can permit an index number to be assigned to each parcel that does denote location (and therefore relation to the index numbers of other parcels), for example, the co-ordinates of the centroid. Lawyers are usually concerned with only one parcel and usually know or can easily determine its index number and therefore lawyers do not have a pressing need for this kind of index. The possibility becomes important in the third topic.

A BRIEF RECOMMENDING CHANGES IN THE ADMINISTRATION OF LAND SURVEYING IN ONTARIO. Submitted by the Association of Ontario Land Surveyors, 1962.

In general terms we have described the concept of a rectangular grid of control lines superimposed on portions of the Province of Ontario. We have already an established conveyancing framework to which we are irrevocably committed by countless land grants,

*(d) registrations should be made at the local offices for the parcels that are affected;*

*(e) the microfilm reproductions and the changes in the record stored in the computer should be made at a central office; and*

*(f) copies of descriptions and documents for searches should be obtainable by mail.*

*2. An index that is derived from co-ordinates and designed in co-operation with other prospective users should be used.*

NOTE: The Commission's report stirred the provincial government to establish an interdepartmental task force to study the feasibility of implementation of the proposals. The study force adopted the name POLARIS (Province of Ontario Land Registration and Information Service) for the new land title information recordation system, and has conducted much research in the past five years. The report of the POLARIS project is expected imminently.

Current expectations are that the project will recommend the streamlining of both the Registry and the Land Titles systems, with conversion to one system only in the fairly distant future. Proposals for reform of the Registry Act will likely include programs to require certification of the titles of owners of land at the time plans of subdivision are registered; amendments to clarify and perhaps reduce the search period; proposals to delete discharged instruments and the discharge instrument itself; and the deletion of time-limited instruments after their expressed period of effectiveness (e.g. delete a registered 10 year lease after the 10 years have run unless renewal registered). The Land Titles Act amendments may change the general boundaries rule; increase the number of affirmations made (for instance affirming execution, to reverse Gibbs v. Messer and eliminating the number of possible overriding interests such as Planning Act violations); limit the interests in respect of which cautions can be registered; and suggest other "housekeeping" reforms.

Expected proposals common to the two systems include the requirement of the registration of executions against individual parcels; the drastic limitation of the number of other possible off the record claims; the elimination of much of the boiler plate in conveyancing documents or of the need for multiple affidavits and of personal seals on execution; and other administrative reforms.

As you can see, the reforms are aimed at getting all information relevant to a particular land parcel title into one place, the abstract index or title register for the parcel, and at limiting the number of potential claims against land. Other proposals will relate to questions of whether or not adverse possession ought to



## SECTION III Remedies of Vendors and Purchasers

## CHAPTER XV

TIME PROVISIONS(a) Introduction

Virtually every contract for the sale of land contains provisions restricting the time within which the parties must perform. We have already seen one example of the operation of such provisions (time limits on raising objections to title, Section (e), Chapter VIII, above). In this Chapter we will consider how Courts interpret time stipulations generally. Although this matter does not concern remedies directly, it serves as an introduction to, and essential background material for, the more specific "Remedies chapters".

This Chapter will consider such questions as, "When does a failure to perform on the date stipulated amount to a breach of contract?"; "What rights does the "innocent party" have when the other party fails to perform on time?"; "What action (or inaction) by the "innocent party" will affect the range of available remedies?"

Many of the judgments in this Chapter express propositions categorically; however, much of what is presented here must be qualified. We shall see much qualification in Chapters XVI through XXV.

(b) Interpretation: Generally

STICKNEY v. KEEBLE, [1915] A.C. 386; [1914-15] All E.R. 73 (H.L.)

[On June 8, 1911, Stickney agreed to purchase a large piece of agricultural land from Keeble and Jellett. The date for closing was October 11, 1911; there were several outstanding leases, and vacant possession was not to be given until they expired, on April 6, 1912. Stickney was a farmer. Keeble and Jellett knew he was purchasing the property with the intention of farming it, and that he had been given notice to quit his present farm in April, 1912.

Keeble and Jellett did not own the land at the time of the agreement. In April, 1911, they had agreed to purchase a large estate, of which it was a part. During June, 1911, they re-sold most of this estate to 23 different purchasers, of whom Stickney was one; they arranged to close all these deals, and their own purchase, on the same day, and to have the conveyance made directly from their vendor to the purchasers. Their plan was to use part of the payments owing to them to pay their vendor, and keep the balance as profit.



CHAPTER XVITENDER

The promise to pay and the promise to convey in a contract for the sale of land are generally mutual and concurrent promises. To place the vendor in default, the purchaser should therefore perform his side of the contract as fully as possible. Perfect tender is strong proof that the person tendering is ready, willing and able to perform his part of the contract. There is old case law that states that there is a duty to tender, but the clear current view is that a plaintiff bringing an action (whether for specific performance, damages, return of purchase money, etc.) or relying on the other party's default (with respect to a time provision, say) in order to get out of the contract, must show that he is ready, willing and able to close, and tender is just one method (although perhaps the best method) of showing that readiness.

(See: McDonald v. Murray (1885), 11 O.A.R. 101 (C.A.);  
Fyckes v. Fetterby (1930), 38 O.W.N. 242; affirmed  
 39 O.W.N. 161 (C.A.);  
Whittal v. Kour, p. 925, above.  
Iwanczuk v. Centre Square Developments Ltd., p. 937 above.  
King v. Urban and County Transport, p. 935 above.)

In some situations, performance by one party becomes unnecessary and tender would be redundant. For instance, if a tender by the purchaser would be a useless ceremony, no tender is required (see Burney v. Moore (1912), 4 O.W.N. 173, where the vendor had already conveyed to a third party). A party who wrongfully repudiates the contract or refuses to perform, excuses tender by the other party (see Beneteau v. Best (1920), 18 O.W.N. 238, where the vendor told the purchaser he would not close). Likewise, failure of one party to tender will generally be excused if tender is rendered impossible by the act of the other party [see McSweeney v. Kay (1868), 15 Gr. 432, where the vendor refused to tell the purchaser the amount due on closing. Some cases, have held that a party must tender even if the other party fails to supply an account (see Dacon Construction Ltd. v. Karkoulis (1964), 44 D.L.R. (2d) 403; Sullivan v. Ramsay (1862), 1 P.E.I. 215)].

There are many technical requirements to effect a perfect tender. The general rule is that the money or documents must actually be produced and seen by the other party. If no place is fixed by the contract to make tender, or no agent is mentioned in the contract to receive tender, tender must be made on the other party personally. [Notice the express provision in the TREB standard form agreement below]. The documents must be acceptable for registration: they must be signed

and generally must be the originals. To be perfect, tender should be made in the coin of the nation; a cheque is not sufficient unless the contract allows it. [See the provision in paragraph 20 of the TREB standard form agreement, below]. It has been held that de minimis non curat lex is not applicable to tender. In Mus v. Matlashewski, [1944] 3 W.W.R. 358, a deficiency of \$3.07 that resulted from miscalculation of interest made the tender invalid. Some cases, however, do relax the strict formalities of tender. In Beckett v. Karklins (below), for instance, Grant J. stated that the vendor did not have to tender because of the anticipatory breach by the purchaser, but added that a draft deed which only showed the husband as grantor, and which should also have included his wife as grantor was, nonetheless, evidence that the vendor was ready, willing and able to close, because the deed could readily have been amended.

Relaxation of past strict interpretations of the requirements of tender should not lull any lawyer into lethargy or carelessness. Perfect tender of everything that could possibly be required is still the safest and most professional representation of a client's interests. On the other hand, the "relaxations" that are frequently, if inconsistently, seen, provide refuge in the event of mistake or inadvertance, and reflect an awareness of Courts that strict formality ought not to be required if the purposes of the formality are fulfilled in some other way.

GENERN INVESTMENTS LTD. v. BACK (1969), 3 D.L.R. (3d) 611; [1969] 1 O.R. 694 (Ont. H.C.).

HARTT, J. (at 614):

Two problems arise with respect to the propriety of the tender made by the plaintiff. First, it is alleged that in the circumstances a tender made at 9 p.m. upon the male defendant personally was improper and, secondly, that the particular cheque tendered was not a "certified cheque" as contemplated by the agreement. The sequence of events that took place on that latter date culminated in a tender upon the defendants personally at their residence during the course of the evening. In the case at bar no specific place for closing was asserted in the agreement. Consequently, it would appear that a purchaser could properly tender on a vendor at any convenient time before midnight. Mr. Back had an opportunity to consult with his solicitor by telephone which he chose not to do. Under these circumstances, a tender made at 9 o'clock in the evening would seem to fall within the proper principle.

It is also clear that tender must be made personally on the purchaser or vendor as the case may be unless otherwise



## QUESTIONS:

1. If documents, which must be registered at the Registry Office in order to preserve priority, are tendered after the Registry Office has closed for the day, is the tender good?

See: Wandoan Holdings Ltd. v. Pieter Vos Ltd. (1974), 47 D.L.R. (3d) 202; 4 O.R. (2d) 102.

2. If an agreement provides that "the vendor agrees to discharge any existing mortgages, at his own expense, against the property on or before closing", and the vendor tenders a mortgage statement and cash sufficient to discharge the mortgage, is the tender "good"?

## NOTE:

Such a contract and tender were considered in Fong v. Weinper, [1973] 2 O.R. 760 (H.C.). Pennell, J. held that the tender was invalid. The vendor's express obligation to discharge the mortgage by the closing date remained unfulfilled, and the purchaser had previously made a requisition on this point. The revesting of the former legal estate in the vendor had not taken place on the day fixed for closing. Do you agree?

The practical problem resulting from such a decision can be shortly stated. Often, a vendor who has agreed to discharge a mortgage "on or before closing", requires the proceeds of the sale of his property, to pay off the mortgage indebtedness. He will often direct the purchaser to make the balance on closing payable in part to the mortgagee, and will promise (undertake) to pay off the mortgagee and register a discharge as soon as possible. Such undertakings are sometimes given by the vendor's lawyer who will agree to hold back sufficient of the funds payable to the vendor to pay the mortgagee, and to make the payment and to register the discharge in due course. Most mortgagees are, naturally, reluctant to provide a discharge of the mortgage until they actually receive payment. You can thus imagine the difficult situation in which the vendor in Fong found himself when required to pay off the mortgage before closing, when he had expected to use the proceeds of closing to make the payment. Some mortgagees who have a good working relationship with the lawyer for the vendor will provide a discharge in escrow to the vendor's lawyer before payment of the mortgage balance. They trust the lawyer to receive funds payable to them (the mortgagees) in full payment of the mortgage balance, before making use of the discharge. Can you think of other solutions for vendors whose lawyers do not have such working relationships with the mortgagee?

3. Some lawyers make no specific objections to the tender. They only say "The tender is bad and I refuse to close". Is this a good practice?

If one party makes specific objections to tender at the time tender is made, does that party waive objections to tender on other grounds?

See: Yuill v. White (1902), 5 Terr. L.R. 275 (C.A.)  
Shockey v. Molnar, [1949] 1 D.L.R. 328, affirmed [1949]  
 4 D.L.R. 302 (S.C.C.).  
Genern Investments v. Back, p. 942 above.

NOTE:

Many of the authorities that have considered the technical requirements of tender are referred to in Gross, Practitioner's Guide to the Law of Tender (1969), 12 Can. Bar J. 282.

## CHAPTER XVII

DAMAGES

When a party to an agreement of purchase and sale defaults on his obligations, the innocent party usually has a choice of remedies. In a given case, he may be able to complete and sue for damages; to terminate and get restitution; to terminate and recover damages; to seek specific performance; or to seek specific performance with an abatement of what would ordinarily be his obligations under the agreement. [Although other remedies are possible, the list above includes those most frequently employed.] We will consider each of these remedies briefly in the Chapters that follow. The materials are by no means exhaustive and they seek to do no more than to illustrate some of the more common problems that arise in attempting to use these remedies when a real estate deal has gone awry.

The object of awarding damages has been said to be to put the innocent party "so far as money can do it ... in the same situation as if the contract had been performed" (see Robinson v. Harman (1848), 1 Ex 850 at 855). This, of course is a general rule applicable to all contracts. But the bare statement of the rule leaves three questions to be answered. They are answered differently in the context of varying types of contracts.

The first question is what "heads of damages" will be awarded to the innocent party? Will he be compensated for the loss of his bargain? Can he recover damages in respect of expenses he has incurred in reliance upon the agreement being duly completed? Can he recover money paid over to the guilty party? Which of the expectation, reliance and restitution interests will the law protect?

The second question is one of remoteness. That is, within any particular head of damages, what kinds of losses are compensable? For instance, when damages are being awarded in respect of the innocent party's expectation losses, can he recover only for loss of the bargain itself, or for consequential losses as well? The test of remoteness is the familiar and flexible two-pronged foreseeability test of Hadley v. Baxendale (1854), 9 Ex. 341.

The third question is that of the actual quantification of damages within a particular head of damages and for a particular loss. The Court must decide how much the Plaintiff's loss is worth monetarily.

These questions will now be considered in the context of a purchaser or vendor of land suing for damages for breach of contract.

(a) The Purchaser Suing

In contract law, generally, the usual rule is that a buyer is entitled to be compensated for loss of his bargain if his seller does not give what he has promised. The buyer's expectation interests are protected to some extent. However, where the buyer is purchasing land, a different and anomalous rule applies in most cases. The rule was firmly established by the House of Lords in the case of Bain v. Fothergill (1874), L.R. 7 H.L. 158. The case accepted the rule propounded in Flureau v. Thornhill (1776), 96 E.R. 635 (C.P.) that had frequently been doubted during the century before Bain v. Fothergill was decided. The rule states that damages cannot be recovered by a purchaser of land for loss of his bargain where the vendor's breach is an innocent failure to make good title. All that the purchaser can recover in an action for damages in such a case are the deposit (with interest) and the costs incurred in investigating the vendor's title (protection of some of the reliance and restitution interests.)

BAIN v. FOTHERGILL (1874), L.R. 7 H.L. 158.

LORD HATHERLEY :—

My Lords, I entirely concur in the view which has been expressed by my noble and learned friend who has just addressed your Lordships.

If the question in this case depends entirely upon the case of *Flureau v. Thornhill* (1), it can scarcely, in my judgment, after the lapse of time which has taken place since that decision, be argued at your Lordships' Bar. I certainly remember myself, now more than fifty years ago, when I was reading in Chambers, to have heard that it was considered as a settled rule that no damages could be recovered for a loss of the benefit of a bargain in case a good title could not be made out by a vendor to his purchaser. That was then considered as settled by the decision in *Flureau v. Thornhill* (1), which had taken place forty-nine years before that time; that would make it altogether ninety-nine years from the present time. Therefore, my Lords, for ninety-nine years the rule has prevailed as settled by *Flureau v. Thornhill* (1), and it has affected and governed, I may say, thousands and thousands of transactions annually, for undoubtedly the contracts for the sale of real estate may be reckoned by thousands annually, and nobody, I apprehend, has as yet ever contradicted it. Whatever may have been the expressions of dissatisfaction that have been uttered with regard to that decision, nobody has come to the conclusion that the rule as established in *Flureau v. Thornhill* (1) should be overthrown. Now, my Lords, upon a much less extensive series of practice by conveyancers, your Lordships' House has been in the habit of acting; but in this case there is not merely the practice of conveyancers, but the common dealings of mankind, which, continuing year after year, as I have said, in many thousands of



consideration of any Court competent to review that case whether the strong opinion of Lord *St. Leonards*, repeated in the 13th edition of *Vendors and Purchasers*, does not shew that the "general understanding of conveyancers has been misapprehended." In the 14th edition of his work (3), Lord *St. Leonards* quotes the whole of the above passage from Mr. Justice *Blackburn's* judgment, and adds, "this seems to be the true rule, it is a point which, whilst at the Bar, I should have treated as beyond doubt."

Upon a review of all the decisions on the subject, I think that the case of *Hopkins v. Grazebrook* (1) ought not any longer to be regarded as an authority.

♦   \*   ♦

If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit.

It is only necessary to add that, in my opinion, if there were any exceptional cases from the rule in *Flureau v. Thornhill* (1), the present case would not fall within any of them, but is within the rule itself.

#### NOTE:

The *Bain v. Fothergill* rule was unequivocally accepted by the Supreme Court of Canada in *Ontario Asphalt Block Co. v. Montreuil* (1916), 52 S.C.R. 541. In *Montreuil*, where the vendor was not able to convey the fee simple promised being seized only of a life estate, the Supreme Court also restricted the types of restitution and reliance losses that were compensable (the question of remoteness, above), to the deposit (with interest) and title investigation costs. The Court held that the purchaser could get no relief in respect of money expended to build a dock in reliance on the vendor's "promise" to make title (incidental reliance).

## QUESTION:

Should the decision in Bain v. Fothergill have been wholeheartedly accepted into Canadian law? In Peacock v. Wilkinson (1915), 51 S.C.R. 319 (referred to above at page 111), Idington, J. rejected the argument that Bain ought not to be followed in litigation involving land governed by a Land Titles System. He said (at p. 330) that there was no need to change the rule enunciated in Bain merely because different legislation was in force here.

Permitting a different result where the dispute was over Land Titles property would be unsatisfactory, for it would result in different measures of damages in different provinces (depending on whether they subscribed to Registry or Land Titles principles) and even within different places within Ontario. Is this reasoning persuasive?

A justification for Bain v. Fothergill in some of the United States is consistency. In those states, if a title defect is discovered after the conveyance, courts generally limit recovery to the consideration paid and incidental expenses incurred (Mississippi State Highway Comm. v. Hemphill (1965), 176 So. 2d 282). Canadian Courts, however, allow damages for where a breach of a covenant in the deed itself (for quiet enjoyment, say) occurs after conveyance. (We will discuss the covenants in the deed itself in Chapter XXIV, below.

The origin of the rule firmly established in Bain v. Fothergill shows how important it is to remember the time, place and context of decisions in other cases, when referring to such other cases as authority to assist in the resolution of a present dispute. The Court in Bain relied heavily on the decision in Flureau v. Thornhill, a decision of the Court of Common Pleas in 1776. The Flureau Court had indeed held that a purchaser was not to be awarded damages "for the fancied goodness of his bargain" (i.e. damages to protect the "expectation interest"). When Bain fell to be decided, the expectation standard was solidly supported as the ordinary measure of damages in breach of contract actions and Flureau was taken to have established an exception in the case of contracts for the purchase and sale of real property where default was caused by an "innocent failure" of the vendor to have title. In fact, at the time Flureau was decided, the expectation standard was not yet generally accepted and it may well have been that the mode of calculating damages adopted in Flureau was that existing generally for the breach of any contract. It was more likely the purchaser than the vendor who was arguing for an exception from the general rule, in Flureau.

A is attempting to buy property "X". She is negotiating with its owner, B, who seems interested but as yet has been non-committal. A then agrees to sell property "X" to C. B decides not to sell to A. What damages will C recover in a suit against A? Is this result appropriate?

NOTE:

Instead of overruling Bain v. Fothergill, Courts have tried to narrow its scope by holding the rule not to apply in various situations. The Courts have been astute to find that the contract has gone off for a reason that will not be characterized as an innocent failure to make title. For instance:

1. A vendor's failure may not be "innocent" where the vendor has not made good faith attempts to complete the transaction. Such a conclusion has been reached where a vendor did not try to get his wife to convey her interest (Trenholm v. Hicks (1969), 1 N.B.R. (2d) 458), or where it was within the vendor's power to obtain a landlord's approval to the new purchasers as tenants but the tenant failed to do his best to get the approval (Day v. Singleton, [1899] 2 Ch. 320).

See also: O'Neil v. Drinkle (1908), 8 W.L.R. 937, and Engel v. Fitch (1868), L.R. 3 Q.B. 314; aff'd (1869), L.R. 4, Q.B. 659.

2. If the vendor conveys the property to another purchaser between the time of the agreement and the proposed date of closing, the rule also does not apply. This situation occurs frequently where a contract for purchase and sale has been entered into, and the vendor and purchaser have a dispute. The vendor, thinking that the purchaser is in breach, conveys to a third party, but later the original purchaser's view in the dispute is vindicated.

See: Pitcher v. Shoebottom (1971), 14 D.L.R. (3d) 522 (Ont. H.C.); Chugal Properties Ltd. v. Levine (1971), 17 D.L.R. (3d) 667; [1971] 2 O.R. 330 (Ont. H.C.).

3. Where the vendor merely refuses to close although he could convey good title, the rule does not apply.

See: Holmes v. Alexson (1976), 12 O.R. (2d) 431 (C.A.); Armstrong v. Graham, [1947] 3 D.L.R. 59; [1947] O.R. 44 (Ont. H.C.); Harvey Foods Ltd. v. Reid (1971), 18 D.L.R. (3d) 90 (N.B.S.C., App. Div.)

4. Where the defect is a matter of conveyancing and not a matter of title, the rule does not apply.

See: Bain v. Fothergill (1874), L.R. 7 H.L. 185; Metropolitan Trust Co. of Canada v. Pressure Concrete Services Ltd. (1973), 37 D.L.R. (3d) 649; [1973] 3 O.R. 629 (Ont. H.C.); aff'd (1976), 9 O.R. (2d) 375; Wroth v. Tyler, [1973] 2 W.L.R. 405; [1973] 1 All E.R. 897.

This last exception (Bain only applies for "title" defects) and its manipulation by the courts is strong evidence of the judicial dislike for the Bain rule. It is sad that the courts that invented the exception and those that expand it wherever possible should feel more comfortable formally espousing the rule while, practically, destroying its efficacy, than attacking the basic rule head-on (recall the reasons given for its adoption in Flureau and Bain above). What risks does such an "accept-but-avoid" approach entail?

The direct attack has been left to Law Reform Commissions in Canada (it was undertaken by the courts in many of the United States: see Corbin, Contracts, 1964 ed., Vol. 5 s. 1098 especially at p. 525). Recently the British Columbia Commission recommended its abolition. Much of the Commission's argument can be gleaned from the Report's Conclusion, reproduced below:

Law Reform Commission of British Columbia, Report on the Rule in Bain v. Fothergill, LRC 28, 1976 (at p. 18):

### CHAPTER III. CONCLUSION

#### A. Recommendation for Change

In the preceding chapters we set out the present law in British Columbia, as we perceive it, with respect to the rule in Bain v. Fothergill, and then attempted to ascertain the precise reason for its emergence and continued application since 1874.

Our research revealed that the rule is inconsistently applied, and it seems to us that the difficulties in the land transfer system which brought about its creation have been considerably reduced.

Reforms in the land registration system in other jurisdictions (that is, the adoption of a Torrens system of certification of title) have led numerous judges to conclude that, in the light of the rationale for the rule, the limitation on the availability of damages should no longer apply.<sup>1</sup> We have noted that these judicial conclusions have gone unanswered by legislatures,<sup>2</sup> but they

<sup>1</sup> See O'Neil v. Drinkle (1908), 8 W.W.R. 937, Slack v. Lockhart, (1863) 1 J.R. (S.C.) 1, Peacock v. Wilkinson (1915), 51 S.C.R. 319, Ontario Asphalt Block Company v. Montreal (1916), 52 S.C.R. 541, Stephen v. Hannan (1912-1913), 6 A.L.R. 431, Jacobs v. Bills, [1967] N.Z.L.R. 249.

In the Court of Appeal (1976), 9 O.R. (2d) 375  
Schroeder, J.A. for the Court (orally):

The learned trial Judge granted an award of damages for breach of contract in lieu of specific performance and directed that such damages should be determined on a reference to the Master. He also gave a direction as to the measure of damages to be applied on the reference. He stated in his reasons [at p. 651 O.R., p. 671 D.L.R.]: "I am of the opinion that in this case the plaintiffs are entitled as part of their damages to any increase in the value of the property from August 31, 1970, to the date of this judgment." In so doing he adopted and applied the principle enunciated by Mr. Justice Megarry in *Wroth et al. v. Tyler*, [1973] 2 W.L.R. 405.

Having regard to our view that the only real and substantial ground for the refusal of the relief sought by way of specific performance was the one first stated by the learned trial Judge, namely, that performance of the contract was dependent upon the consent or action of a third party, the circumstances of this coincide with the circumstances existing in *Wroth et al. v. Tyler*. The learned trial Judge was therefore justified in giving such direction as to the measure of damages to be applied by the Master.

We are respectfully of the opinion that on the facts and circumstances disclosed in *Wroth et al. v. Tyler*, the principle there enunciated was valid and was appropriately applied in the present case.

(The appeal was dismissed.)

NOTE:

Lord Cairns' Act was repealed in England. Ontario has a provision similar to Lord Cairns' Act in s. 21 of The Judicature Act R.S.O. 1970, c. 228, as amended:

s. 21 Where the court has jurisdiction to entertain an application for an injunction against a breach of a covenant, contract or agreement, or against the commission or continuance of a wrongful act, or for the specific performance of a covenant, contract or agreement, the court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance, and the damages may be ascertained in such manner as the court directs, or the court may grant such other relief as is considered just.

## QUESTIONS:

1. An agreement of purchase and sale of land was entered into, subject to obtaining the consent necessary to comply with s. 29 of the Planning Act. The vendor undertook to obtain this consent, but in fact did nothing and no consent was obtained. If the property was worth \$10,000 at the date of the contract, \$12,000 at the date set for closing, and \$15,000 at the date of judgment, what measure of damages should be awarded to the purchaser?
2. What would be the measure of the purchaser's damages if the vendor resold the property after the date of closing, but before the date of judgment?
3. If a vendor breaches the contract at the date of closing, what would be the measure of damages when:
  - (a) The contract price was \$10,000, the property value at the date of the breach (closing) was \$8,000, and the property value at the date of judgment was \$15,000?
  - (b) The contract price was \$10,000, the property value at the date of the breach (closing) was \$12,000, and the property value at the date of judgment was \$6,000?
4. Does a plaintiff have a duty to mitigate? Can that duty be squared with what the courts did in Wroth v. Tyler or in Metropolitan Trust?
5. Is the measure of damages influenced by the fact that a plaintiff has no money left with which to mitigate?

## NOTE:

In Liesbosch Dredger v. S. S. Edison, [1933] A.C. 449, the plaintiffs' vessel was sunk due to the negligence of the defendants. The plaintiffs were not immediately able to obtain a new ship because all their funds were tied up in the sunken vessel. The House of Lords held that such loss as arises from the purchaser's inability to buy in the market due to his impecuniosity cannot be made the subject of compensation, on the basis that the plaintiffs' "actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort" (per Lord Wright at p. 460). The Supreme Court of Canada accepted this view in Dawson v. Helicopter Exploration Co. (1958), 12 D.L.R. (2d) 1.

In some instances, however, Liesbosch Dredger had been distinguished. For example, in Freedhoff v. Pomalift Industries Ltd. et al., [1970] 3 O.R. 571 (H.C.), a ski resort operator mortgaged his lands and chattels to buy from the defendant a new ski-lift which proved to be useless. Because the ski-lift did not function, the plaintiff was not able to raise the money to pay off the mortgages, and lost his land and chattels to creditors. The defendant claimed that the plaintiff was not entitled to any compensation for loss of his lands or profits because impecuniosity should never be considered in computing damages. The court stated that "there must be a distinction made between impecuniosity extraneous of the tort or breach of contract when damages caused by it must be regarded as being too remote, and between impecuniosity traceable to the wrongful acts of the defendant, foreseeable and a likely consequence of the defendant's fault (per Stewart J. at p. 581). The Court held that this case fell into the second classification, and so Liesbosch Dredger did not apply.

Without referring to any of the cases cited by Stewart J. in the High Court, the Ontario Court of Appeal, [[1971] 2 O.R. 773], reversed the lower Court's decision with respect to the damages awarded for the loss of the land and chattels. The Court held that the loss of the plaintiff's land and business by reason of his inability, through diminished revenues, to keep up the payments on the mortgage on the property, did not meet the test of foreseeability. In any event, the plaintiff had failed to prove with any cogency that he had suffered any loss by virtue of the forced sale.

## QUESTION:

You are consulted by a vendor who has decided not to complete an agreed upon sale of his residential property because he has received a better offer from a third party. What advice would you give the vendor?

See: ASA Constructions Pty. Ltd. v. Iwanov, [1975] 1 N.S.W.L.R. 512 (S.C.N.S.W.)

Reference: M.G. Baer, The Assessment of Damages for Breach of Contract -- Loss of Profit, (1973), 51 Can. Bar Rev. 490.

## NOTE:

The decision in Wroth v. Tyler has spawned a flurry of case law elucidating and expanding the principles discussed in Megarry, J. The full exploration of the ramifications of Wroth is well beyond the scope of this course. Further developments may occur if the measure of damages adopted in Wroth is permissible as the common law measure. Such a result would require the negation of reasoning such as that employed by the Court of Appeal in Freedhof, and might involve a re-thinking of what it is that contract damages are designed to protect. Should it matter, for instance, whether Wroth is a wealthy speculator buying a commercial centre, or a labourer who has drained the savings account to make his own down payment? The hardship on a consumer purchaser of awarding "ordinary" common law damages in a time of high inflation was commented upon by Cory, J., in Stewart v. Ambrosina (1976), 10 O.R. (2d) 483 (S.C.O.), who noted that the courts cannot operate in a vacuum.

See also Schweikardt v. Thorne, [1976] 4 W.W.R. 249 (B.C.S.C., Meredith, J.) in which damages were awarded to a purchaser at the date he discovered that his action for specific performance must fail (because his vendor had sold to a protected third party bona fide purchaser without notice) on a principle different from that on which Megarry J. decided Wroth v. Tyler, but one that leads to the same result and beyond.



## CHAPTER XVIII

LIENS

Another important right a party to a real estate transaction may have is a "lien". A lien is a charge against property, similar to a mortgage. The lien entitles the lienholder to sell the land involved and to use the proceeds to satisfy his debt. In general, however, the lienholder will not sell under the lien. He will usually wait until the property is to be sold or mortgaged. When the purchaser or mortgagee demands title free of the lien, the lienholder will be paid from the funds payable by the purchaser or mortgagee at the time of closing, and will then discharge the lien.

A lienholder is a secured creditor. That is, subject to the claims of prior lienholders or mortgagees, the property subject to the lien is available to satisfy the debts of the lienholder before the debts of general creditors may be satisfied. For example, suppose that X has a lien for \$10,000 on V's property. Suppose further that V has suffered judgments to be obtained against him in the amount of \$50,000, and that the judgment creditors have all filed writs of execution after the time at which X obtained his lien. If the property is sold for \$40,000 under one of the executions, X will get the full \$10,000 before the execution creditors get anything. They share the remaining \$30,000 pro rata. If X did not have a lien, but merely a debt claim (followed by judgment and execution), he and all the other execution creditors would share the \$40,000 pro rata. The advantage of being a secured creditor by having a lien, accrues similarly if V becomes bankrupt. Again X has his claim paid in full before unsecured creditors get anything.

(a) Purchasers' Liens:

A person who has agreed to purchase land is generally entitled to a lien to protect his deposit and any other money which he has paid on account of the purchase price, as well as interest and costs. The lien is an equitable interest in the land involved. The lien arises at the moment the purchaser hands over his money pursuant to the contract to purchase. (Whitbread, below). However, it is not generally of any importance until the contract goes off or some third party attempts to assert a right against the land, and the purchaser relies on his lien for protection of amounts already paid. (J. A. R. Leaseholds and Whitehead below). The lien is enforceable by judicially-ordered sale of the subject lands. It is an equitable interest in the land in respect of which a certificate of *lis pendens* may issue.

The lien binds the land and any subsequent purchaser of the land except a purchaser protected by the general law, The Registry Act or The Land Titles Act. The manner in which a lien is created will decide how such a purchaser obtains his protection.

WHITBREAD & CO. v. WATT, [1902] 1 Ch. 835 (C.A.)

[On January 25, 1897, Whitbread agreed to purchase from Saunders a site for a pub in a "building estate". The price was £500; £200 was paid as a deposit, and the balance was due on closing. The agreement contained the following clauses:

(3.) The purchase is to be completed as soon as 300 houses shall have been erected on the said estate ...

(10.) If 300 houses shall not be erected on the said estate within two years from the date of this agreement, the purchasers shall have the right to rescind and cancel this agreement...

(11.) In the event of either the vendor or the purchasers cancelling this contract by virtue of any of the powers herein given, no costs, expenses, loss, or damage of any kind whatsoever shall be claimed or paid from one to the other, but the deposit, without interest, shall be returned by the vendor to the purchasers.

Saunders then sold the entire estate to Saxelby, who mortgaged it; the mortgage was assigned to Watt. Saxelby and Watt each had notice of Saunders' agreement to sell to Whitbread. The 300 houses were not built within two years. Saunders became bankrupt, without having accounted for Whitbread's deposit to any of his successors in title. In December, 1900, Whitbread gave notice of cancellation to Watt, and claimed repayment of the deposit, which was refused.

Whitbread claimed a declaration that it was entitled to a lien on the land for £200, and enforcement of this lien by foreclosure or sale. Whitbread succeeded at trial, and Watt appealed.]

**VAUGHAN WILLIAMS L.J.** In my opinion this appeal must fail.

The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity. For instance, when an action is brought for money had and received to the use of the plaintiff, it is not true that the money has been so received, but that is the way in which the law states the case in order to do justice. When Lord Westbury in *Rose v. Watson* (1) speaks of "a transfer to the purchaser of the ownership of a part of the estate corresponding to the purchase-money paid," and Lord Cranworth speaks of the purchaser being exactly in the position of a





25. The money arising from the sale [under a power of a sale in a mortgage] shall be applied by the person receiving the same as follows:

- Firstly, in payment of all the expenses incident to the sale or incurred in any attempted sale;
  - Secondly, in discharge of all interest and costs then due in respect of the mortgage under which the sale was made;
  - Thirdly, in discharge of all the principal money then due in respect of the mortgage; and
  - Fourthly, . . . in payment of the amounts due to the subsequent encumbrancers according to their priorities,
- and the residue shall be paid to the mortgagor.

On December 27, 1961, the date of the sale under power of sale, the appellant's lien against the lands in question was still in existence for the sum of \$29,792.

For the foregoing reasons the appeal should be allowed with costs and the judgment in appeal should be varied so as to provide that the appellant is entitled to judgment, with costs, against both respondents for the sum of \$29,792.

#### QUESTION:

If an unpaid vendor has not seen fit to take security for the payment of the full purchase price, is there any reason to prefer the claim of the vendor to claims of general creditors of the purchaser?

#### (b) Vendors' Liens:

When a vendor sells land on credit, he may also be entitled to a lien on the property to secure the purchaser's obligation to pay (or any other obligation the purchaser may have). Sometimes a vendor will stipulate expressly, in the deed by which he conveys to the purchaser, for a "vendor's lien". Such stipulations are, of course, effective and subject the purchaser's estate to an interest in the nature of a mortgage. In this section, we are more concerned with implied vendors' liens, liens given by law where the parties have not included any express provision protecting the vendor. The lien is often said to be the corollary to the doctrine of equitable conversion (whereby the purchaser is regarded in equity as the owner of the land as soon as the parties have entered into a specifically-enforceable agreement of purchase and sale): while the purchaser "owns" the land in equity, the vendor is entitled to have it sold to pay off the purchase price still owing. Perhaps an historical explanation of the origin of liens is more correct. Land could not be the subject of execution, so that a vendor who had sold realty on credit, could not execute against what might be the

purchaser's only asset. To remedy this "felt injustice", equity gave the vendor a lien, under which the property could be sold in much the same way as it can be under modern day execution. A vendor can get a declaration that he has a vendor's lien, but it is clear that the lien exists before any Court declaration. It exists at least from the moment of conveyance on credit, and perhaps from the moment of entering into the agreement to sell. (See e.g. MacIntyre in (1952) 30 Can. Bar Rev. 1016). Its only practical significance, however, is after conveyance, since before conveyance, the vendor may either sue for specific performance (the price), or terminate the agreement if the purchaser does not pay. The lien may operate to give the vendor a priority he would not otherwise enjoy, against mortgagees, volunteer purchasers, or creditors of his purchaser (Lang v. MacMillan, below), or may operate to make the vendor a secured creditor in the purchaser's bankruptcy. As with the purchaser's lien, the lien of the unpaid vendor is enforceable by sale of the purchaser's estate.

Where a vendor sells land on credit, there is often said to be a presumption in favour of a vendor's lien, and the onus is on the party alleging the absence of the lien to prove such circumstances as negative the prima facie presumption. A case in which the onus was satisfied is Freeborn v. Goodman, below. The lien may also be unenforceable against certain persons, on the basis of sections 69 or 71 of The Registry Act (above), the general law (since the vendor's lien is an equitable estate in the land), or s. 7 of The Conveyancing and Law of Property Act, R.S.O. 1970 c. 85, which provides that:

7. A receipt for consideration money or other consideration in the body of a conveyance or endorsed thereon is, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, sufficient evidence of the payment or giving of the whole amount thereof.

["Sufficient evidence" has, on several occasions, been held to mean "conclusive evidence".]

LANG AND LANG v. MACMILLAN et al. (1958), 13 D.L.R. (2d) 778; [1958] O.W.N. 341 (Ont. C.A.)

KING J.:—The vendors sold the lands herein to the purchaser, who assumed an existing mortgage, paid a certain sum in cash, and gave a mortgage back to the vendors on the same lands for the full balance of the purchase-price. The deed from the vendors to the purchaser was registered in the Registry Office and, almost immediately thereafter, the mortgage back from the purchaser to the vendors was registered. Some months prior to all this, a judgment creditor of the purchaser had lodged a writ of *fi. fa.* with





## CHAPTER XIX

RESCISSION

The option of "rescinding" the agreement of purchase and sale may be open to a vendor or purchaser in a given situation. For instance, a purchaser may "rescind" the contract where the vendor has breached it by failing to make the title called for by the agreement of purchase and sale. At its simplest, "rescission" means putting an end to the necessity of performance of any still-to-be-done contractual obligations. But rescission has consequential implications. Our purchaser may want to recover the deposit paid to the vendor at the time of entering the agreement. He may want to be compensated for expenses incurred in preparing for closing (legal fees and title investigation costs), or for the loss of the bargain. The purchaser may be "disaffirming" the contract, in the sense of saying "you (vendor) have breached the contract - put me (purchaser) back where I was before we entered it and I'll go away", or may be "affirming" it - asserting the contract and the vendor's breach of it, as the basis of a claim for damages.

Confusion has arisen as to whether the act of "rescinding" involves an election to "disaffirm", thus precluding a later action for damages. The first few references in this chapter illustrate the dispute and problems that can arise for the careless practitioner.

Rescission is a remedy that may be invoked before a deal is closed or, occasionally, after closing as well. Rescission after closing is dealt with in Chapter XXIV below, and the present Chapter is confined to attempts to escape from the contract before completion.

If the purchaser wants the land, he will ordinarily sue for specific performance of the agreement when the vendor breaches the agreement. However, the purchaser may decide he has made a bad bargain, and so avail himself of a breach by the vendor to escape from the duty to pay. Questions sometimes arise as to whether a vendor's breach is serious enough to allow a purchaser to rescind, or whether the purchaser must, instead, complete and be left only with a remedy in damages for the vendor's deficient performance. These questions are more easily dealt with by examining when the Courts will order the purchaser to complete despite a breach by the vendor, and so will be considered in Chapter XXIII: "Specific Performance with Abatement", below pages to

. A purchaser may also rescind the contract prior to closing because of material misrepresentations made by the vendor or his agent, that induced the purchaser to enter into the agreement. Such rescission may be possible whether the misrepresentations be innocent, negligent or fraudulent.

Although a Vendor will often sue for specific performance (i.e. the contract price) when the purchaser is in breach of his agreement, rescission is sometimes a valuable remedy. The Vendor may rescind under the clause in the standard form agreement of purchase and sale declaring the agreement "null and void" if "any valid objection to title is made to the Vendor which the Vendor shall be unable or unwilling to remove and which the Purchaser will not waive", subject, of course, to the limits discussed in cases such as Metropolitan Trust v. Pressure Concrete Services and Mason v. Freedman (above). Such rescission will, by the terms of the agreement, prevent even the limited damages allowed when the rule in Bain v. Fothergill is applicable. Misrepresentations may have been made by the purchaser, and, as is the case in the converse situation, the Vendor will be able to rescind before closing if the tests of materiality and reliance are satisfied.

#### QUESTION:

Assuming that the purchaser has committed a serious breach of the agreement, in what cases might a Vendor choose to rescind rather than sue for specific performance and/or damages? Do the facts of life of high mortgage and short term loan rates, rising property values and the need to live somewhere give any clue?

HORSLER v. ZORRO, [1975] 2 W.L.R. 183; [1975] 1 All E.R. 584 (Ch.)

Megarry, J. at 190:

Fourth, although the word "rescind" has a fairly precise meaning, I readily accept that the word is not invariably used with the same meaning. Thus in a contract it may be used with whatever meaning the contract gives it. If, for instance, the parties to the contract agree to "rescind" it on certain terms, I see no reason why those terms should not contain an agreement for the payment of some sums by one to the other, which may or may not be called "damages." Again, a contract may contain provisions which confer a unilateral power of "rescission" on certain terms in certain events; and if that unilateral power is properly exercised, the consequences of doing so will be as stated in the contract, including the payment of any "damages" for which it provides. In truth, the meaning of the term "rescission" in a contract, like that of any other term, is whatever the contract gives it. See, for instance, *Mussen v. Van Diemen's Land Co.* [1938] Ch. 253 (especially at p. 260); and consider also *Stockloser v. Johnson* [1954] 1 Q.B. 476. In the case before me, however, nobody has relied on, or even mentioned, any provision of the contract relating to rescission; and when the word "rescind" is used otherwise than in a contract, and particularly in a formal document such as a writ or order of the court, I think it will usually, at all events, bear its normal meaning, related to *restitutio in integrum* and so on.



## NOTE:

The question raised by the above materials has never been authoritatively dealt with by Ontario Courts. There seems to be no case holding that "if you 'rescind' you cannot get damages"; nor is there any case stating unequivocally that a party can both rescind and claim damages as well. McNiven v. Pigott (1914), 31 O.L.R. 365 (C.A.), came closest to raising the issues directly. The Court of Appeal allowed the plaintiff purchasers to rescind where their vendor failed to make title. The plaintiffs were to be allowed a refund of sums paid toward the purchase price, and the expenses involved in investigating title. The matter was referred to the Master to take account of the damages, if any, over and above these costs, to which the plaintiffs were entitled by reason of the defendant's failure to make title and his dealings with the property. However, when the case returned to the Court of Appeal on the eventual appeal from the Master's report, the plaintiff's damages were limited to the expenses involved in investigating title and similar matters, on the basis of the applicability of the rule in Bain v. Fothergill. (See (1915), 22 D.L.R. 141 and 147.)

## QUESTION:

P agreed to buy land from V. V fraudulently misrepresented the area of the land. P discovered the misrepresentation before closing. He no longer wants the land but does want damages from V. What should P (or his lawyer) do?

## NOTE:

In George Wimpey Canada Limited v. Focal Properties Limited (S.C.C., June 14, 1977, not yet reported; dismissing appeal from Ontario Court of Appeal (1977), 73 D.L.R. (3d) 387), Wimpey and Brumac, a predecessor of Focal, agreed to develop land for a residential subdivision. Focal was to attend to Planning Act compliance, and the agreement contemplated closing 5 years later (in 1973) when the subdivision plan was expected to be registered and development work well under way. The relevant provisions of the agreement were:

4. Brumac shall be responsible at its sole cost and expense to obtain registration in the Registry Office for the Registry Division of the County of Halton of three plans of subdivision substantially in accordance with the three draft plans of sub-

division attached hereto and shall indemnify Wimpey in respect of any claims arising therefrom. Brumac shall enter into all reasonable subdivision and other agreements required by the Town of Georgetown or any other municipality or government with respect to registration of the said plans and provision and installation of the services referred to in paragraph 5 hereof. The obligations of Brumac under each subdivision agreement shall, if required, be secured by a performance bond or other security satisfactory to the Town of Georgetown or such other governmental authorities. Brumac shall be responsible for the payment of all costs, charges, levies and other expenses incurred or to be incurred in connection with the development of the property, including real estate taxes up to the registration date and excluding only the servicing charges mentioned in paragraph 5 hereof. All rebates of levies shall be deemed to be the exclusive property of Brumac.

...

6. Wimpey shall have the right at all times, prior to the closing date, through its agents or representatives, to enter on the property or any part thereof for the purposes of inspecting the same, making soil tests and other tests and taking or rechecking levels, elevations, contours and grades.

...

9. The transaction of purchase and sale shall be completed on March 15th, 1973 or on such other date as may be mutually acceptable (the "Closing Date") when Brumac shall deliver to Wimpey a good and registerable conveyance of an undivided one-half interest in the property then remaining.

10. Time shall be of the essence of this agreement.

...

14. This agreement is subject to the condition that if the provisions of Section 26 of The Planning Act apply, this agreement shall be effective to create an interest in land only if such provisions are complied with by Brumac obtaining the necessary consents or otherwise complying with the said provisions, and the parties hereto agree that The Planning Act vis à vis themselves shall be deemed to be complied with, and the purchaser will not requisition to the contrary.

Despite assiduous efforts Focal was unable to have the subdivision plan registered and there was little prospect of procuring registration in the near future. In these circumstances, Focal sued to have its obligations under the agreement declared at an end. It succeeded in the Supreme Court of Ontario and in the Court of Appeal, both of which produced long and convoluted reasons for judgment that relied primarily upon the doctrine of frustration. Wimpey appealed:

Judson, J. (for the Court, Laskin, Spence, Dickson, Pigeon and Judson, JJ.) at p. 4 of the Reasons for Judgment:

Although paragraph 9 contemplated extension of the date for closing beyond March 15, 1973 by mutual agreement, no such agreement was made. His conclusion stated in the following paragraph:

I have concluded that March 15, 1973 was the closing date contemplated by the parties and that time was of the essence in relation to it. That seemed to me to be the plain meaning of the sale agreement. The parties appear to have allowed some five years to obtain registration in circumstances both were aware might not be easy. They provided for extension of this period by mutual agreement. No evidence was called that would indicate any other intention on the part of either side to the transaction.

In the Court of Appeal, Jessup J.A., in complete agreement with the trial judge, held that the sale agreement, by its terms, came to an end on the failure to get registration of the proposed plans of subdivision by March 15, 1973. He also held that the trial judge had correctly concluded that the agreements were frustrated because of the impossibility of their performance within any foreseeable period of time.

Houlden J.A. confined his reasons to finding that the contracts were frustrated.

Lacourciere J.A., in a dissenting judgment, held that the obligation to achieve registration was not qualified as to time and therefore continued after March 15, 1973. He also held that there was no case of frustration.

All three members of the Court of Appeal were of the opinion that registration of the proposed plans of subdivision constituted a true condition precedent to the performance of the contract.

I would affirm the judgment at trial and that of the Court of Appeal on the one ground that the contract came to an end on March 15, 1973. It is unnecessary to deal with the question of frustration.

I would dismiss the appeal with costs.

